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8 **MONTANA FIRST JUDICIAL DISTRICT COURT**
9 **LEWIS & CLARK COUNTY**

10 PPL MONTANA, LLC, a Delaware limited
11 liability corporation, and AVISTA
CORPORATION, a Washington corporation,

12 Plaintiffs,

13 v.

14 STATE OF MONTANA,

15 Defendant.
16

Cause No.: CDV-2004-846

MEMORANDUM AND ORDER
ON MOTIONS FOR SUMMARY
JUDGMENT ON WHETHER
THE STREAMBEDS OF THE
MISSOURI, MADISON AND
CLARK FORK RIVERS ARE
SCHOOL TRUST LANDS

17 Defendant and Counterclaimant State of Montana has moved for partial
18 summary judgment asserting that the streambeds of the Missouri, Madison and Clark
19 Fork Rivers are school trust lands. Plaintiffs and Counterdefendants PPL Montana,
20 LLC (PPL), and Avista Corporation (Avista) have moved for partial summary
21 judgment contending that the streambeds are not school trust lands. The motions were
22 heard December 16, 2006.

23 Related to this motion are the State's motion for partial summary
24 judgment that the rivers are navigable and Avista's motion for partial summary
25 judgment that the rivers are not navigable. By separate Order, the Court has held that

1 the rivers are navigable and, therefore, the State owns the streambeds.

2 DISCUSSION

3 Montana was admitted to the Union pursuant to the Enabling Act of
4 February 22, 1889. Enabling Act, ch. 180, 310, 25 Stat. 676; Dep't of State Lands v.
5 Pettibone, 216 Mont. 361, 369, 702 P.2d 948, 952-53 (1985). Section 10 of the
6 Enabling Act granted certain lands to the State to be held by it for the support of
7 common schools. Section 11 placed restrictions on the disposition of those lands. It
8 also provided that the lands may be leased.

9 In accordance with Section 11 of the Enabling Act, the 1889 Montana
10 Constitution, Article XI , Section 2, placed those lands in what is referred to as the
11 public school fund. That section provided in part:

12 The public school fund of the state shall consist of the proceeds of
13 such lands as have heretofore been granted, or may hereafter be granted,
14 to the state by the general government, known as school lands; and those
15 granted in lieu of such; lands acquired by gift or grant from any person
16 or corporation under any law or grant of the general government; and of
all other grants of land or money made to the state from the general
government for general educational purposes, or where no other special
purpose is indicated in such grant. . . .

17 (Emphasis added.)

18 The provisions of Article XI, Section 2, of the 1889 Constitution are
19 carried forward in Article X, Section 2, of the 1972 Constitution. It provides in part:

20 **Public school fund.** The public school fund of the state shall
21 consist of:

22 (1) Proceeds from the school lands which have been or may
hereafter be granted by the United States,

23 . . .

(4) All other grants of land or money made from the United
States for general educational purposes or without special purpose. . . .

24 (Emphasis added.)

25 A determination as to whether the streambeds of navigable rivers of the

1 State are school trust lands is an issue of first impression. Although the streambeds of
2 navigable waterways are not part of the express grant of land "for the support of
3 common schools" under the Enabling Act, the State argues that the Equal Footing
4 Doctrine implies a grant. The State further argues that because title to the streambeds
5 vested in the State upon its admission to the Union, the streambeds are grants "without
6 special purpose" under Article X, Section 2, of the 1972 Montana Constitution and,
7 therefore, they are school trust lands.

8 The Utilities contend that the streambeds were not granted to the State
9 under the Enabling Act, but that they passed to the State automatically under the Equal
10 Footing Doctrine as part of the State's sovereignty. In the alternative, the Utilities
11 argue that if the streambeds were granted to the State, the streambeds have a "special
12 purpose" because they are public trust lands that must be held in trust for the benefit
13 and use of all Montanans under the Public Trust Doctrine. PPL also argues that the
14 flooded lands (those lands outside the streambed and submerged by water upland from
15 the dams) are not school trust lands.

16 **1. The Equal Footing Doctrine**

17 Under English common law, the Crown held sovereign title to lands
18 under navigable waters for the benefit of the people. When the thirteen colonies
19 gained their independence, they claimed title to those lands as the sovereign successors
20 to the English Crown. **Utah Div. of State Lands v. United States**, 482 U.S. 193, 195-
21 96 (1987). Under the Equal Footing Doctrine, states admitted to the Union after the
22 original thirteen colonies obtained title to the land under navigable waters within their
23 boundaries upon statehood. **Pollard's Lessee v. Hagan**, 44 U.S. (3 How.) 212, 229
24 (1845). Prior to a state being admitted to the Union, the United States held the land in
25 trust for the future states. **Id.**, at 212.

1 Section 8 of the 1889 Enabling Act provided that upon approval of its
2 Constitution, Montana "shall be deemed admitted by congress into the union under and
3 by virtue of this act on an equal footing with the original states from and after the date
4 of said proclamation." The United States Supreme Court has stated:

5 [T]he ownership of land under navigable waters is an incident of
6 sovereignty. As a general principle, the Federal Government holds such
7 lands in trust for future States, to be granted to such States when they
8 enter the Union and assume sovereignty on an "equal footing" with the
established States. After a State enters the Union, title to the land is
governed by state law.

9 **Mont. v. United States**, 450 U.S. 544, 551 (1981) (citations omitted). The Court went
10 on to hold that "title to the bed of the Bighorn River passed to the State of Montana
11 upon its admission into the Union." **Id.**, at 556-57.

12 Apparently, **Mont. v. United States** is the only United States Supreme
13 Court case which has used the term "grant" when discussing the Equal Footing
14 Doctrine. In other cases, it has used the term "vest." **Ariz. v. Cal.**, 373 U.S. 546, 597
15 (1963) ("[L]ands underlying navigable waters within territory acquired by the
16 government are held in trust for future states and that title to such lands is
17 automatically vested in the States upon admission to the Union."); **Or. v. Corvallis**
18 **Sand & Gravel Co.**, 429 U.S. 363, 371 (1977) ("the State's title to the riverbed vests
19 absolutely as of the time of its admission.")

20 **2. The Montana Constitutions**

21 The Equal Footing Doctrine concerns only whether a state has obtained
22 title to the land under navigable waterways. As stated in **Mont.v. United States**, once
23 title has passed, title to the land is governed by the laws of the State. Thus, the issue is
24 whether the term "grant" as used in Article XI, Section 2, of the 1889 Constitution and
25 Article X, Section 2, of the 1972 Constitution includes property received by the State

1 under the Equal Footing Doctrine.

2 Article X of the 1972 Constitution is the article on education and public
3 lands. Section 2 establishes the public school fund. Section 11 establishes a public land
4 trust and provides for the disposition of public lands. Both Sections use the terms
5 "granted" and "grant". Article X, Section 2, states in pertinent part:

6 The public school fund of the state shall consist of:

7 (1) Proceeds from the school lands which have been or may
hereafter be granted by the United States;

8 . . .

(4) All other grants of land or money made from the United
9 States for general educational purposes or without special purpose. . . .

10 (Emphasis added.)

11 In part, Article X, Section 11, states:

12 (1) All lands of the state that have been or may be granted by
13 congress, or acquired by gift or grant or devise from any person or
14 corporation, shall be public lands of the state. They shall be held in trust
for the people, to be disposed of as hereafter provided, for the respective
purposes for which they have been or may be granted, donated or devised.

15 . . .

16 Article XI, Section 2, and Article XVII, Section 1, of the 1889 Constitution
17 contained similar language.

18 The term "grant" is both a verb and a noun, and it has a number of
19 meanings, depending on how it is used. When used as a verb, BLACK'S LAW
20 DICTIONARY defines "grant" as "1. To give or confer (something), with or without
21 compensation. 2. To formally transfer (real property) by deed or other writing. 3. To
22 permit or agree to. 4. To approve, warrant or order." When used as a noun, "grant"
23 means "1. An agreement that creates a right of any description other than the one held by
24 the grantor. 2. The formal transfer of real property. 3. The document by which a transfer
25 is effected. 4. The property or property right so transferred." BLACK'S LAW DICTIONARY

1 (8th ed., 1999).

2 In determining how the terms "granted" and "grant" are to be interpreted, it
3 is necessary to look at the context in which the term is being used. In Article X, Section
4 2(1), of the 1972 Constitution, it is clear that school lands which have been granted by
5 the United States means those lands specifically identified in the Enabling Act.

6 In Article X, Section 11(1), the term "granted" describes all lands which
7 have been transferred to the state through the action of Congress. While the underlying
8 basis for transferring title to the streambeds of navigable waterways is the Equal Footing
9 Doctrine, the transfer could only be accomplished through the Enabling Act which was
10 an act of Congress.

11 As used in Article X, Section 2(4), the term "grants" is a noun and means
12 the transfer of title to lands owned by the United States. It does not include the transfer
13 of lands which were only held in trust by the federal government and which were
14 automatically vested in Montana upon its admission to the Union.

15 For these reasons, the Court concludes that the streambeds of the rivers are
16 part of the public land trust. As public lands of the State, the State has the authority
17 under Article X, Section 11, to classify the lands. Section 77-1-202(1), MCA, gives the
18 Board of Land Commissioners (the Board) the authority to manage state lands. In
19 exercising its authority, the Board is guided by the principle "that these lands and funds
20 are held in trust for the support of education and for the attainment of other worthy
21 objects helpful to the well-being of the people of this state as provided in The Enabling
22 Act." **Id.** Thus, the Board has the authority to lease the streambeds and use the funds for
23 the support of public education.

24 **3. Flooded Lands**

25 PPL also has argued that the flooded lands are not school trust lands.

1 Under The Enabling Act, the federal government granted Section 16 and 36 of every
2 township in Montana to the State as school trust lands. PPL has conceded that six of its
3 dams occupy Section 16 and 36 lands. PPL further argues that it purchased the lands
4 outright or easement rights to flood the lands. The Court concludes that with respect to
5 the flooded lands, there remain genuine issues of material fact which preclude summary
6 judgment.

7 **NOW, THEREFORE, IT IS ORDERED:**

8 1. The State's motion for partial summary judgment that the
9 streambeds of the Missouri, Madison and Clark Fork Rivers are school trust lands
10 **IS GRANTED.**

11 2. Avista and PPL's motion for summary judgment that the streambeds
12 are not school trust lands **IS DENIED.**

13 3. PPL's motion for partial summary judgment that the flooded lands
14 are not school trust lands **IS DENIED.**

15 DATED this _____ day of September 2007.

16 _____
17 THOMAS C. HONZEL
18 District Court Judge

19 pcs: Robert L. Sterup/Kyle Ann Gray
20 Stephen R. Brown
21 Mike McGrath/Anthony Johnstone/Jon Ellingson

22 d/TCH/PPL MT & Avista-St of MT
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**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

PPL MONTANA, LLC, a Delaware limited
liability corporation, and AVISTA
CORPORATION, a Washington corporation,

Plaintiffs,

v.

STATE OF MONTANA

Defendant.

Cause No. CDV-2004-846

**MEMORANDUM AND ORDER ON
THE NAVIGABILITY OF THE
MISSOURI, MADISON
AND CLARK FORK RIVERS**

Defendant and Counterclaimant State of Montana (State) has moved
for partial summary judgment on liability and for Rule 37 expenses. The State's
motion is in two parts:

1) that the Missouri, Madison and Clark Fork Rivers are navigable rivers and that the
State owns the streambeds to those rivers; and 2) that the streambeds are part of the
State's school trust lands.

Plaintiff and Counterdefendant Avista Corporation (Avista) has moved

1 for partial summary judgment, contending that the Clark Fork River is not a navigable
2 river and that title did not pass to the State upon statehood. In addition, Avista and
3 Plaintiff and Counterdefendant PPL Montana, LLC (PPL), have moved for partial
4 summary judgment on the issue of whether the streambeds are school trust lands.

5 The motions were heard December 14, 2006. This Order addresses
6 only the navigability of the rivers. By separate orders, the Court will address the
7 question of whether the riverbeds are school trust lands and whether the State is
8 entitled to Rule 37 expenses.

9 **BACKGROUND**

10 Avista is a Washington State corporation registered to do business in
11 Montana, with its principal place of business in Spokane, Washington, and PPL is a
12 Delaware limited liability corporation registered to do business in Montana
13 (collectively referred to as "the Utilities"). The Utilities own hydroelectric facilities in
14 Montana.

15 Avista owns and operates the Noxon Rapids Dam on the Clark Fork
16 River in Montana. PPL owns the Thompson Falls Dam located on the Clark Fork
17 River. It also owns seven dams on the Missouri River and a dam on the Madison
18 River. In addition, PPL owns the Mystic Lake Dam located on the West Rosebud
19 Creek.

20 In order to operate the facilities the Utilities had to obtain licenses from
21 the Federal Energy Regulatory Commission (FERC). FERC issues the licenses
22 pursuant to the Federal Power Act (FPA), 16 U.S.C. § 791a *et seq.* The Utilities hold
23 the proper licenses for their respective dams.

24 In October 2003, two residents of Gallatin County initiated an action in

1 U.S. District Court against the Utilities and others. **Dolan v. PPL Mont., LLC**, No.
2 CV-03- 167-M-SWM (D. Mont.). The plaintiffs alleged that state riverbeds are held in
3 the public school trust by the State and that the Utilities have failed to pay rental
4 compensation for their use and occupation of the state lands. The federal court
5 allowed the State to intervene as a plaintiff. Upon motion of the Utilities, all plaintiffs,
6 except the State, were dismissed from that action. **Id.** The Utilities then moved to
7 dismiss the action.

8 ////

9 On November 12, 2004, prior to the federal court issuing its order on
10 the motion to dismiss, the Utilities filed this action for declaratory relief. In their
11 complaint, the Utilities asked the Court: 1) to declare that Montana's hydroelectric
12 resources statute is preempted by the Federal Power Act; 2) to declare that the
13 State's common-law claims for compensation are preempted by the Federal Power
14 Act and the federal navigational servitude; and 3) to declare that: a) the Plaintiffs
15 have acquired a prescriptive easement to use the riverbeds; b) the State is equitably
16 estopped from asserting a right to lease payments under the hydroelectric resources
17 statute; c) the State has waived any rights to lease payments; d) the State's request
18 for payment is barred by laches and applicable statutes of limitation; and e) the State
19 breached agreements reached with the Utilities in the course of licensing.

20 In response, the State filed an answer and counterclaim containing five
21 causes of action: declaratory relief, uncompensated use of state lands, unjust
22 enrichment, trespass, and negligence. The State also filed a motion for summary
23 judgment on the Utilities complaint for a declaratory judgment.

24 In September 2005, the federal court entered its order adopting Federal

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1 Magistrate Judge Erickson's Findings and Recommendation to vacate any rulings
2 that go beyond the issues of standing and jurisdiction, and to dismiss the action
3 because the federal court lacked jurisdiction.

4 On April 14, 2006, this Court issued its Memorandum and Order on the
5 State's motion for summary judgment. In that decision, the Court addressed two
6 questions of law:

7 1) whether the State's counterclaim for compensation is preempted by the FPA or the
8 federal navigational servitude, and 2) whether the Utilities can assert any legal or
9 equitable defense against the State in its role as trustee of state lands. In granting
10 the State's motion for summary judgment, this Court determined that neither the FPA
11 nor the federal navigational servitude preempts the State from obtaining
12 compensation under Section 77-4-208, MCA. The Court further held that the Utilities
13 cannot assert any of their legal or equitable defenses against the State.

14 **STANDARD OR REVIEW**

15 Summary judgment is appropriate if "there is no genuine issue as to
16 any material fact and that the moving party is entitled to judgment as a matter of law."
17 Rule 56(c), M.R.Civ.P. The moving party has the initial burden of showing that no
18 genuine issues of material fact exist. **Jobe v. City of Polson**, 2004 MT 183, 10, 322
19 Mont. 157, 10, 94 P.3d 743, 10. Once the moving party establishes no genuine
20 issues of material fact exist, the burden shifts to the non-moving party opposing
21 summary judgment to prove otherwise. **Id.** If the court determines no genuine
22 issues of material fact exist, the court will determine whether the moving party is
23 entitled to judgment as a matter of law. **Id.**

24 **DISCUSSION**

1 The State asserts two arguments in support of its position that it owns
2 title to the streambeds of the Missouri, Madison and Clark Fork Rivers. First, the
3 State argues that because historical records prove that the rivers at issue are
4 navigable, the State holds title to the riverbeds under the Equal Footing Doctrine.
5 The State further argues that the Utilities are collaterally estopped from re-litigating
6 navigability, as the rivers have been determined navigable by FERC and the Federal
7 Power Commission (FPC), FERC's predecessor. Avista contends that the Clark Fork
8 River is not a navigable river and that title did not pass to the State upon statehood.

9 **Navigability of the Missouri, Madison and Clark Fork Rivers**

10 Under the Equal Footing Doctrine, states admitted to the Union after the
11 original thirteen colonies obtained title to streambeds beneath navigable waters upon
12 statehood. **Pollard's Lessee v. Hagan**, 44 U.S. (3 How.) 212, 229 (1845). A state's
13 claim to the title of streambeds under the Equal Footing Doctrine rests on a
14 determination of whether the body of water was navigable at the time of the state's
15 admission to the Union. **United States v. Utah**, 283 U.S. 64, 75 (1931). Federal law
16 is the controlling authority used to decide the issue of navigability for title purposes.
17 **Id.**; **Mont. Coalition for Stream Access v. Curran**, 210 Mont. 38, 43, 682 P.2d
18 163, 166 (1984).

19 The United States Supreme Court established the test for navigability in
20 **The Daniel Ball**, 77 U.S. (10 Wall.) 557, 563 (1870):

21 Those rivers must be regarded as public navigable rivers in law which
22 are navigable in fact. And they are navigable in fact when they are
23 used, or are susceptible of being used, in their ordinary condition, as
highways for commerce, over which trade and travel are or may be
conducted in the customary modes of trade and travel on water.

24 See also **United States v. Utah**, at 81-83.

1 While there is no clearly defined meaning of "actual use" or "susceptible
2 of being used," courts around the country have acknowledged specific uses of rivers
3 which are sufficient to establish navigability, while meeting the standard of "trade and
4 travel . . . conducted in the customary modes of trade and travel on water." With
5 regard to "actual use," the use of the river does not have to be commercially
6 profitable. See **Utah v. United States**, 403 U.S. 9, 11 (1971) ("Hence it is suggested
7 that this was not the use of the lake as a navigable highway in the customary sense
8 of the word. . . .We think that is an irrelevant detail. The lake was used as a highway
9 and that is the gist of the federal test.")

10 The mode or means of travel is also not limited to large-scale
11 commercial or multiple passenger vessels.

12 [T]he true test of navigability of a stream does not depend on the mode
13 by which commerce is, or may be conducted, nor the difficulties of
14 attending navigation. If this were so, the public would be deprived of
15 the use of many of the large rivers of the country over which rafts of
16 lumber of great value are constantly taken to market.

17 It would be a narrow rule to hold that in this country, unless a
18 river was capable of being navigated by steam or sail vessels, it could
19 not be treated as a public highway.

20 **The Montello**, 87 U.S. (20 Wall) 430, 441 (1874). See also **United States v. Holt**
21 **State Bank**, 270 U.S. 49, 56 (1926) ("[N]avigability does not depend on the particular
22 mode in which such use is or may be had - - whether by steamboats, sailing vessels
23 or flatboats. . . .") Furthermore, the floating of timber down rivers may also establish
24 navigability. In **Curran**, the Montana Supreme Court acknowledged that navigability
25 in fact under federal law can be determined by the log-floating test. **Curran**, 210
Mont. at 44, 682 P.2d at 166.

 With regard to assessing navigability under the alternative test,

1 "susceptible of being used," the key inquiry is "susceptibility in the ordinary condition
2 of the rivers, rather than of the mere manner or extent of actual use." **United States**

3 **v. Utah**, 283 U.S. at 82. In **The Montello**, the Court explained:

4 The capability of use by the public for purposes of transportation and
5 commerce affords the true criterion of the navigability of a river. . . .If it
6 be capable in its natural state of being used for purposes of commerce,
7 no matter in what mode the commerce may be conducted, it is
8 navigable in fact, and becomes in law a public river or highway.

9 **The Montello**, at 442.

10 The Ninth Circuit Court of Appeals has stated that "use of the river need
11 not be without difficulty, extensive, or long and continuous." **Or. v. Riverfront Prot.**

12 **Ass'n.**, 672 F.2d 792, 795 (9th Cir. 1982).

13 a. **Missouri River**

14 The State has presented considerable evidence that based on historical
15 use, the Missouri River is a navigable waterway. The State also directs the Court's
16 attention to the 1948 decision of the FPC, which found that "the Missouri River,
17 throughout its entire length is a navigable water of the United States." **In re Mont.**
18 **Power Co., IT-5840**, 7 F.P.C. 163 (F.P.C. 1948). In that case, the Montana Power
19 Company, PPL's predecessor, was challenging the Commission's determination that
20 Montana Power was required to apply for licenses for its hydroelectric developments
21 on the Missouri and Madison Rivers.

22 The Commission's decision was affirmed by the United States Court of
23 Appeals, District of Columbia Circuit. **Mont. Power Co. v. Fed. Power Comm'n**,
24 185 F.2d 491 (D.C. Cir. 1950). In that case, the court addressed the question of
25 whether the Missouri River from Ft. Benton to its headwaters at Three Forks is a
26 navigable water of the United States. The court held that it was. In reaching its

1 decision, the court specifically referenced the Great Falls of the Missouri which have
2 always presented a natural barrier to navigation. Although the falls have never been
3 navigated, the court noted that there is substantial evidence showing actual use of
4 the river upstream from Ft. Benton to the falls and from above the falls to Three
5 Forks.

6 The **Mont. Power Co.** case dealt with navigability under the FPA, not
7 with navigability for title purposes. Under the FPA, navigable water is not defeated
8 by reason of interruptions between the navigable parts of streams by falls or rapids.
9 16 U.S.C. §796(8).

10 This case does not involve federal power plant licensing and PPL
11 argues that the appropriate analysis to use is to look at the relevant reaches of the
12 river, not the entire stretch of the river. It claims that the Great Falls clearly prevent
13 navigability of those reaches of the Missouri and, therefore, the river is not navigable.
14 The Court concludes otherwise. Navigability based on either actual use or
15 susceptibility to use may be determined, despite the presence of obstacles to free
16 passage, such as rapids, riffles or occasional areas of low water requiring portage, as
17 long as "the natural navigation of the river is such that it affords a channel for useful
18 commerce. **The Montello**, at 441. This was later affirmed in **United States v. Utah**,
19 when the Court stated:

20 [T]he mere fact of the presence of such sandbars causing impediments
21 to navigation does not make a river non-navigable. It is sufficient to
22 refer to the well-known conditions on the Missouri River and the
23 Mississippi River. The presence of sandbars must be taken in
24 connection with other factors making for navigability. In *The Montello*,
the Court said: "Indeed, there are but few of our fresh-water rivers
which did not originally present serious obstructions to an uninterrupted
navigation. In some cases, like the Fox River, they may be so great
while they last as to prevent the use of the best instrumentalities for
carrying on commerce, but the vital and essential point is whether the

1 natural navigation of the river is such that it affords a channel for useful
2 commerce. If this be so the river is navigable in fact, although its
3 navigation may be encompassed with difficulties by reason of natural
4 barriers such as rapids and sandbars."

5 **United States v. Utah**, 283 U.S. at 86-87 (*quoting* **The Montello**, 87 U.S. (20
6 Wall) at 443) (emphasis added).

7 The history of this case and the pleadings filed by PPL also leave
8 the Court to conclude that the Missouri River is navigable for title purposes. As
9 noted this case originated in U.S. District Court for Montana. In its answer to
10 the amended complaint in federal court, PPL admitted that the Missouri River
11 is navigable. When it filed its complaint in this Court, it alleged that the
12 Missouri River is navigable and its answer to the State's counterclaim, it
13 admitted that the Missouri River is navigable.

14 The rule in Montana is that parties are bound by admissions made
15 in their pleadings. **Fey v. A. A. Oil Corp.**, 129 Mont. 300, 323, 285 P.2d 578,
16 590 (1955); **Audit Servs. v. Frontier-West, Inc.**, 252 Mont. 142, 148-49, 827
17 P.2d 1242, ___ (1992) (citations omitted). The entire focus of this case since its
18 inception has been whether the State is entitled to compensation because of
19 the Utilities occupancy of the State owned streambeds. PPL has admitted that
20 the Missouri River is navigable and is bound by its admissions.

21 b. **Clark Fork River**

22 The State has submitted historical documents showing that the
23 Clark Fork River is navigable in fact, including documents showing that the
24 river was used for log drives.

25 In a proceeding for the licensing of the Thompson Falls Dam, the

1 FPC found:

2 The section of the Clark Fork River between Pend Oreille Lake in
3 Idaho and the mouth of the Jocko River in Montana was used for
4 the transportation of persons and property between areas now
5 constituting the states of Oregon, Idaho, and Montana from 1810
6 to 1870, such use being canoe and bateaux transportation of furs
7 by the fur traders of the British Northwest Fur Co., the canoe
8 transportation of the original missionaries to the Indian tribes in the
9 Clark Fork basin, and with the use of short portages around the
10 Cabinet Rapids and Rock Island Rapids, by steamboats of the
11 Oregon Steam Navigation Co. and its subsidiary, the Oregon &
12 Montana Navigation Co. in the carriage of substantial numbers of
13 gold miners, their pack animals and supplies, as well as
14 commercial freight consigned to the gold camps in the vicinity of
15 what is now Helena, Mont.

16 **The Mont. Power Co., Project No. 1869**, 8 F.P.C. 751, at Finding 13 (F.P.C.
17 1949). The Montana Power Company, PPL's predecessor, did not contest that
18 finding.

19 The FPC also found that the Clark Fork was navigable when it
20 licensed the Cabinet Gorge in Noxon Rapids Projects in Montana. **Wash.**
21 **Water Power Co., Project No. 2058**, 10 F.P.C. 657 (F.P.C. 1951) ("[T]he
22 Clark Fork River is navigable water of the United States at least from the Pend
23 Oreille Lake in the state of Idaho to the mouth of the Jocko River in the state of
24 Montana."); **Wash. Water Power Co., Project No. 2075**, 14 F.P.C. 731
25 (F.P.C. 1955) ("Clark Fork is a navigable water of the United States, at least
from Pend Oreille Lake in Idaho to the mouth of the Jocko River in Montana,
within which stretch proposed Project No. 2075 is to be located") (citations
omitted).

Although neither the Montana Power Company nor the
Washington Water Power Company, Avista's predecessor, challenged the

1 FPC's findings, the Utilities contend they are not estopped from contesting the
2 navigability of the Clark Fork River in this proceeding since the test for
3 navigability before the FPC is different from the test for navigability in
4 determining title.

5 The differences between navigability for title and navigability for
6 proceedings before the FPC is succinctly set forth by the Ninth Circuit Court:

7 Navigability for title to riverbeds differs in three important
8 respects from navigability for federal regulatory jurisdiction over
9 power plants under the Commerce Clause. The former must exist
10 at the time the State is admitted into the Union. Also it must exist
11 in the river's ordinary condition. . . .it cannot occur as a result of
12 reasonable improvements. . . .Finally to support federal regulatory
jurisdiction over power plants the river must by statute be, or have
been, "suitable for use for the transportation of persons or
property in the interstate or foreign commerce." 16 U.S.C. §
796(8) (1976). No such "in interstate or foreign commerce"
requirement exists when the issue is navigability for title.

13 **Riverfront Prot. Ass'n**, 672 F.2d at 794, n. 1 (citations omitted).

14 After reviewing the cases relied on by the parties and the various
15 documents which have been submitted, the Court concludes that the Clark
16 Fork River is navigable. In licensing the dams, the FPC, of course, was
17 proceeding under its regulatory jurisdiction over power plants. That, however,
18 does not mean that this Court cannot rely on the FPC's findings in a case
19 involving navigability for title. As discussed above, obstructions which require
20 portages do not defeat a finding of navigability for title where the river provides
21 a channel for commerce. Here, the record shows that the Clark Fork River
22 was used for the transportation of persons and property and that use meets
23 **The Daniel Ball** test for navigability.

24 Furthermore, like the Missouri River, both PPL and Avista have

1 admitted in pleadings in the federal action and in this action that the Clark Fork
2 River is navigable. In its answer to the State's counterclaim in this action,
3 Avista denied that the Clark Fork River is navigable. However, paragraph 18
4 of the Utilities' complaint specifically states that Avista's Clark Fork projects are
5 "on the Clark Fork River, a navigable river." The Court concludes that PPL and
6 Avista are bound by their admissions.

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9 c. Madison River

10 PPL's Madison Dam and the related Hebgen Dam Storage Facility
11 operate under the same federal license as the Missouri River dams. However,
12 during the 1948 licensing proceeding, the FPC did not need to address the
13 issue of the Madison River's navigability because those projects also occupy
14 federal lands.

15 There apparently is little historical documentation regarding the
16 navigability of the Madison River. In 1986, the Heritage Research Center in
17 Missoula prepared the "Montana Navigable Water Study" for the Montana
18 Department of State Lands. That study states: "The Madison River has
19 experienced considerable use historically by explorers, trappers, miners,
20 farmers, and loggers, and is generally considered to have high potential for
21 navigation. However, recorded entrances of commercial navigation are few."
22 (Mason Aff., Ex. A, at 52 ("Montana Navigable Water Study")).

23 The study does note that in 1913 the Madison River was used to
24 float logs from the mouth of the West Fork of the Madison to Varney, a

1 distance of 55 miles and that Hebgen Lake has been navigated. (Id.) Today,
2 the Madison River experiences considerable recreational use.

3 Despite the sparse historical record, the Court concludes the
4 Madison River is navigable. As with the Missouri and Clark Fork Rivers, PPL
5 has admitted in its pleadings that the Madison River is navigable, and PPL is
6 bound by its admissions.

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12 For the foregoing reasons, the Court concludes that the State's
13 motion for partial summary judgment on the navigability of the Missouri,
14 Madison and Clark Fork Rivers should be granted, and Avista's motion should
15 be denied.

16 **IT IS SO ORDERED.**

17 DATED this _____ day of September 2007.

18
19 _____
20 THOMAS C. HONZEL
District Court Judge

21 pc: Robert L. Sterup/Kyle Ann Gray
22 Stephen R. Brown
Mike McGrath/Anthony Johnstone/Candace West/Jon Ellingson

23 T/TCH/ppl v state order navigability.wpd

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8 **MONTANA FIRST JUDICIAL DISTRICT COURT**
9 **LEWIS & CLARK COUNTY**

10 PPL MONTANA, LLC, a Delaware
11 limited liability corporation, and
12 AVISTA CORPORATION, a
Washington corporation,

13 Plaintiffs,

14 v.

15 STATE OF MONTANA,

16 Defendant.

Cause No.: CDV-2004-846

MEMORANDUM AND ORDER
ON PPL'S MOTION FOR
PARTIAL SUMMARY JUDGMENT
BARRING THE STATE'S
COUNTERCLAIMS FOR
MONETARY DAMAGES

17 Plaintiff and Counterdefendant PPL Montana, LLC (PPL) has moved for
18 partial summary judgment on Defendant and Counterclaimant State of Montana's (State)
19 counterclaims which seek monetary damages. The motion was heard December 14, 2006.
20 The Court concludes that PPL's motion should be denied.

21 **DISCUSSION**

22 PPL seeks partial summary judgment and dismissal of the State's
23 counterclaims for trespass, negligence, uncompensated use of state lands and unjust
24 enrichment on grounds that any claim for damages under those theories is barred by the
25 applicable statutes of limitation. Prior to PPL filing its motion, the State filed a similar

1 motion for partial summary judgment. In that motion the State argued that Plaintiff and
2 Counterdefendant Avista Corporation (Avista) and PPL could not assert legal or
3 equitable defenses against the State's counterclaims.

4 On April 14, 2006, this Court issued its Memorandum and Order,
5 concluding that PPL and Avista (the Utilities) cannot assert any of their legal or equitable
6 defenses against the State.

7 The Utilities seek a declaratory judgment that the State is barred
8 from obtaining rental payments by the doctrine of laches or the applicable
9 statutes of limitation. However, neither can be asserted in an action
10 involving the protection of state lands. . . .Therefore, the Court concludes
11 that the Utilities cannot assert the defense of laches or any statute of
12 limitation against the State.

13 (Memorandum and Order, April 14, 2006, p.16: 23-17: 13). In support of its decision the
14 Court relied on Montana Supreme Court decisions **State ex rel. Boorman v. State Bd. of**
15 **Land Comm'rs**, 109 Mont. 127, 94 P.2d 201 (1939) and **Norman v. State**, 182 Mont.
16 439, 597 P.2d 715 (1979). In both of those cases, the supreme court recognized that the
17 provisions of the Montana Constitution addressing state public lands and their disposition
18 must be strictly observed. **Boorman**, 109 Mont. at 133, 94 P.2d at 203; **Norman**, 182
19 Mont. at 446-47, 597 P.2d 715 at 719.

20 In this motion, PPL contends that the Court's April 14, 2006, Memorandum
21 and Order only addressed whether PPL could assert a statute of limitation defense against
22 the State's counterclaim that it holds title to the streambeds of the Missouri, Madison and
23 Clark Fork Rivers and not whether PPL can assert a statute of limitation defense against
24 the State's claims for monetary damages under the theories listed above. As a result,
25 because the statutes of limitation found at Section 27-2-201, MCA, *et seq*, apply to the
State "in the same manner as to actions by private parties," Section 27-2-103, MCA, the
State's claims are time barred.

The State argues that the Court ruled on this issue in its April 14, 2006, Memorandum and Order, and it cannot be relitigated. The Court agrees.

The April 14, 2006, Memorandum and Order is clear that PPL and Avista cannot assert a statutes of limitation defense against the State on its counterclaims. Moreover, the State's counterclaims are based entirely on its allegations that PPL and Avista have and continue to occupy state lands without paying rental compensation. Pursuant to Article X, Section 11, of the Montana Constitution, the State is the trustee of state lands and those lands may only be disposed of as provided by law. Accordingly, PPL and Avista may not argue that the statutes of limitations have run on the State's counterclaims because the disposition and use of state public lands protected by the Montana Constitution are directly at issue.

NOW, THEREFORE, IT IS ORDERED that PPL's motion for partial summary judgment that the State of Montana's counterclaims for monetary damages are barred by the statute of limitations **IS DENIED**.

DATED this _____ day of September 2007.

THOMAS C. HONZEL
District Court Judge

pcs: Robert L. Sterup/Kyle Ann Gray
Stephen R. Brown
Mike McGrath/Anthony Johnstone/Jon Ellingson

d/TCH/PPL MT & Avista-St of MT